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No. 84-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,

Petitioner,

vs.

DORIS ELSWORTH, MILDRED BEST, SANDRA DUNAWAY, and JO ANN MIRO,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT, JO ANN MIRO, et al. IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's holding in *Silkwood v. Kerr-McGee Corp.*, ... U.S. ....., 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) and in light of the provisions of 49 U.S.C., Section 1506 by which Congress has expressly declared that the provisions of the Federal Aviation Act of 1958 are not intended to abridge remedies that a party may have under state law, the giving, in a state civil action in which Respondents sought compensatory damages for wrongful deaths arising out of the crash of a Travel Air airplane designed and manufactured by Petitioner Beech and in which Respondents introduced, *inter alia*, expert evidence that the design of the Travel Air violated minimum safety standards as established by regulations of the Federal Aviation Administration ("FAA"), of a negligence *per se* instruction, embodying a principle which has been an established part of the state's negligence jurisprudence for more than a century, is either violative of the Pre-emption Doctrine or in conflict with any prior decision of this Court.

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OPINIONS BELOW

Petitioner Beech has omitted to indicate that under California law, by the order of transfer to the Supreme Court of the State of California, the Opinion and Decision of the California Court of Appeal, reported at 147 Cal. App. 3d 384 and 195 Cal. Rptr. 226, has become a nullity and without any force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. (*Ponce v. Marr* (1956) 47 Cal. 2d 159, 301 P. 2d 837; *Knouse v. Nimocks* (1937) 8 Cal. 2d 482, 66 P. 2d 438.)

JURISDICTION

The jury instruction which Beech challenges related to only one of five theories of recovery asserted by Respondents against Beech. The jury returned a general verdict against Beech and in favor of Respondents and did not specify or identify the theory or theories upon which it had found Beech liable. On appeal, Beech expressly disavowed making any challenge whatever of the sufficiency of the evidence to support the findings against it on *any* theory. Under California established rules of appellate review, error in the giving of a challenged instruction is never presumed, but must be affirmatively shown by the appellant. (*Kostecky v. Henry* (1980) 113 Cal. App. 3d 362, 170 Cal. Rptr. 197.) Since Beech had failed to show how it could have been hurt by the giving of the challenged instruction, the California Supreme Court, even had it agreed with Beech that the instruction was erroneous, would have been precluded, by virtue of the provisions of California Constitution, Article VI, Section 13 from re-

versing the judgment in favor of Respondents. The judgment of the Supreme Court of California, therefore, is based upon an adequate and independent state ground. No question or claim within the purview of 28 U.S.C., Section 1257(3), has been properly raised by Petitioner Beech. The Decision of the California Supreme Court is based solely upon the application of a statutory rule affecting the burden of proof, which has been uniformly and consistently applied in civil actions tried in the courts of California. No federal question of any substance has been presented by Petitioner Beech.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

49 U.S.C., Section 1506:

Nothing contained in this chapter [the Federal Aviation Program] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

California Evidence Code, Section 669:

(a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or

(2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

STATEMENT OF THE CASE

Respondents Jo Ann Miro, Michael George Miro, Edward Andrew Miro and Jeannie Lee Miro (herein collectively referred to as Respondents, Jo Ann Miro, et al.) adopt and incorporate by this reference the Statement of the Case as set forth in the brief of Respondents Elsworth, Best and Dunaway in opposition to the Petition for a Writ of Certiorari.

REASONS FOR DENIAL OF THE WRIT[1]

I.

THE GIVING IN THIS CASE OF A NEGLIGENCE PER SE INSTRUCTION THAT WAS FULLY SUPPORTED BY THE EVIDENCE ADDUCED AT TRIAL IN NO WAY CONFLICTS WITH OR IMPINGES UPON THE FAA'S EXCLUSIVE REGULATORY JURISDICTION.

In an attempt to invest this case with constitutional stature, Beech makes the eye-catching but specious contention that the giving of the negligence *per se* instruction in this case impermissibly interferes with the FAA's "exclusive and plenary authority over the subject of aircraft certification." Although none of Beech's arguments possesses the slightest merit, Beech has gamely tried to overcome this insurmountable handicap by the substitution of rhetoric for substance, by the merciless repetition of its arguments, by the extravagant hyperbole of its claims, and, above all, by the increasing stridency of its contentions.

Wringing its corporate hands, Beech ponders what to do: should it ground its entire fleet? Beech expresses its grim foreboding that as a result of the California Supreme Court's decision "confusion and havoc . . . will be visited upon federal regulatory schemes and the industries or activities which they regulate" (Ptn., p. 21). Beech's apprehensions are groundless. Beech may

[1] In addition to the reasons hereinafter set forth, the Miro Respondents adopt and incorporate all of the contentions made, and the authorities cited, by Respondents Elsworth, Best and Dunaway in their Brief in Opposition to the Petition for Writ of Certiorari.

continue to design, build, sell and even fly its planes without hindrance of any kind. But its planes may not be *crashed* with impunity to Beech, if those crashes are caused by Beech's failure to see that the design of its aircraft conforms to minimum safety standards. In such an instance it is entirely appropriate to hold Beech accountable for any injuries caused by such shortcomings. Holding such a manufacturer to account in no way interferes with any federal regulatory scheme. To the contrary, it enhances and complements Congress' manifest concern for public safety.

It is critically important to note that this case, despite Beech's contention to the contrary, has nothing whatsoever to do with the FAA's exclusive jurisdiction to *certify* aircraft. This action is a civil wrongful death action in which the Respondents merely sought compensatory damages for the deaths of their respective decedents. Respondents did not seek, and the jury was not empowered to revoke the Travel Air's airworthiness certificate. Nor did Respondents ask the jury to invalidate or impugn the certification procedure. Respondents did not seek to challenge the jurisdiction of the FAA to establish regulations, nor did they attempt to have the jury alter, amend or revoke any of those regulations. Respondents did not ask the jury to find that Beech was a "violator" (Ptn., pp. 12, 17) or a "federal lawbreaker" (Ptn., p. 8)[2].

The jury in this case was merely asked to perform the traditional function of juries in such cases, and one

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[2] In its comment accompanying California Evidence Code, Section 669, the California Law Revision Commission cogently observes that "the ultimate question [in a case involving the application of this section] is whether the opponent of the presumption was negligent rather than whether he violated the statute . . ."

of the issues that this jury was necessarily called upon to decide was the *factual* issue of whether the design of the Beech Travel Air complied with the applicable minimum safety standards established by the FAA regulations.

The jurors in this case would doubtlessly be shocked and dismayed to learn that they were – at least as Beech views it – "reconsidering" (Ptn., pp. i, 16, 22), "redetermining" (Ptn., pp. i, 2, 8, 11, 17, 19, 22), "interfering with" (Ptn., p. 2), "policing" (Ptn., pp. 2, 14, 15, 19, 20, 21), "second-guessing" (Ptn., pp. 8, 11, 12, 15, 17, 20), "redeciding" (Ptn., p. 8), "overruling" (Ptn., pp. 11, 12, 14, 17), "re-examining" (Ptn., pp. 14, 17), and "overturning" (Ptn., p. 14) the orders, regulations and certification decisions of the FAA; that they had been "deputized" as "assistant FAA inspectors" (Ptn., p. 15) to "invade the province of the FAA" (Ptn., p. 17) and to "police" its activities (Ptn., p. 2); and that they were collectively functioning not merely as a civil jury in a wrongful death suit, but also as a "legislature" and "regulatory agency" (Ptn., pp. 2, 19).

Aside from being an exhilarating trip through the Thesaurus, Beech's characterizations of the jury's actions is nothing more than empty rhetoric and it does not bear even an arguable semblance to the realities of the situation. This Court has already expressly determined that, at least insofar as public safety is concerned, the action of a state civil jury in awarding damages does not impermissibly interfere with a federal agency's regulatory jurisdiction. (*Silkwood v. Kerr-McGee Corp.*, —— U.S. ——, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984).)

II.

IN LIGHT OF THE EVIDENCE IN THE RECORD, THE RESPONDENTS WERE CLEARLY ENTITLED TO THE NEGLIGENCE PER SE INSTRUCTION BASED ON THE PROVISIONS OF CALIFORNIA EVIDENCE CODE, SECTION 669, AND THE UNANIMOUS DECISION OF THE CALIFORNIA SUPREME COURT HOLDING THAT THE GIVING OF THAT INSTRUCTION DOES NOT VIOLATE THE PRE-EMPTION DOCTRINE IS MANIFESTLY CORRECT.

In order to bring Beech's arguments into perspective, it is necessary to examine the contentions that Beech has *not* made:

1. Beech has never challenged the sufficiency of the evidence to support the verdict against it on *any* of the theories of recovery asserted by Respondents.[3]

2. Beech has never challenged the propriety of permitting Respondents' expert witnesses to testify at trial that the design of the Travel Air violated the five Civil Air Regulations which were ultimately the subject of the negligence *per se* instruction.[4]

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[3] Respondents asserted five theories of liability against Beech: negligence and strict liability on the basis of the Travel Air's defective design; negligence and strict liability based upon the failure of the aircraft design to meet the minimum safety standards established by the FAA for single-engine stalls, single-engine climb rate and spin characteristics for this category of airplane; and negligence based on Beech's failure to adequately warn pilots of the aircraft's undue spinning tendencies during single-engine stalls.

[4] The regulations are CAR 3.85(b), 3.106, 3.120, 3.123 and 3.124.

A consideration of the necessary implications of the foregoing permits one to see Beech's contention for the incongruous thing that it is. Given the state of the record in this case, it is indisputably established that the jury could have found Beech to have been negligent in the design of the Travel Air, *and could have based that finding on the expert testimony that the design of this aircraft violated the enumerated CAR's.* Most importantly, the jury could have reached this conclusion *without* resort to the negligence *per se* instruction. Beech's contention, therefore, reduces to the following absurdity: although it was clearly permissible and proper for the jury to conclude that Beech was negligent in failing to meet the minimum safety standards in its design of the Travel Air, it was an error of constructional magnitude to *inform* the jury that they could so conclude!

Beech's argument is marked by yet a further major incongruity. Beech has expressly conceded that the jury in this case could have found Beech liable for defective design of the Travel Air even if Beech had fully complied with all applicable FAA regulations, because the jury could have determined that such compliance was insufficient to absolve Beech's duty as a manufacturer. Beech, therefore, has conceded that a civil jury is at liberty to impose *higher* standards on a manufacturer. This, apparently, would have no chilling or adverse effect upon the aviation industry and would not interfere with any federal regulatory scheme. Permitting a jury to determine whether *minimum* standards had been complied with, however, will, according to Beech, bring on the Apocalypse. Beech, understandably has never attempted to explain this patent incongruity.

III.

IN LIGHT OF THE EXPRESS SAVINGS PROVISION AND IN LIGHT OF THIS COURT'S HOLDING IN SILKWOOD, THE DECISION OF THE CALIFORNIA SUPREME COURT IS UNQUESTIONABLY CORRECT.

The position of the Respondents in this case is even stronger than the position of their counterpart in *Silkwood*: In the instant case it is not necessary for the Court to infer Congressional intent to tolerate state civil suits in areas that are subject to federal regulatory control. In 49 U.S.C., Section 1506, Congress has expressly declared that the provisions of the Federal Aviation Act of 1958 are not intended to abridge remedies that a party may have under state law. As the California Supreme Court succinctly noted, the doctrine of negligence *per se* is one of those remedies (Ptn. App., p. 8a).

Beech perforce concedes that the Respondents are free to resort to state court remedies and to seek recovery against it under "traditional principles" of negligence and strict liability in tort (Ptn., p. 16). Although this is clearly a concession of Beech's entire position on this petition for certiorari, Beech is unfazed. Beech makes the demonstrably fallacious argument that in rejecting Beech's claim of error in the giving of the negligence *per se* instruction the California Supreme Court has "created a new, separate and independent ground of civil liability" (Ptn., p. 1).

The doctrine of negligence *per se*, based upon viola-

tion of a statute or ordinance has been judicially recognized in California for over a century. (See, *Siemers v. Eisen* (1880) 54 Cal. 418.) In 1967, the negligence *per se* principle was codified as California Evidence Code, Section 669. In its comment accompanying Section 669, the California Law Revision Commission notes that that section "codifies a common law presumption that is frequently applied in California cases." (See, *Alarid v. Vanier* (1958) 50 Cal. 2d 617, 327 P. 2d 897.) The principle embodied in Section 669, therefore, is unquestionably a part of California's "traditional" negligence jurisprudence. It is an even-handed principle that is applied uniformly in civil cases. It may be used to establish a plaintiff's contributory negligence as well as a defendant's negligence. (*Nevis v. Pacific Gas & Elec. Co.* (1954) 43 Cal. 2d 626, 275 P. 2d 761.)

Since the trial evidence in this case included expert testimony that the design of the Beech Travel Air violated the applicable minimum air safety regulations, the Respondents were clearly entitled to the negligence *per se* instruction. Indeed, in light of that evidence, it would have been prejudicially erroneous for the trial court to refuse that instruction. (*Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal. App. 3d 620, 128 Cal. Rptr. 807.)

Beech's position – that Respondents should be conclusively bound by the *factual* determination of compliance with the CAR's, a determination that was made *years* before Respondents had suffered any injury – would clearly emasculate Respondents' state remedy since it would deprive them of any opportunity to adjudicate the fundamental and purely factual issue of

whether the design of the Travel Air complied with the federal regulations.

Beech lamely asserts that the only remedy available to a party who claims that an aircraft design does not comply with safety regulations is to bring an action to challenge certification in the federal district court pursuant to the provisions of 49 U.S.C., Section 1486(a) within sixty days of the issuance of a type certificate (Ptn., p. 24). This "remedy", however, was no remedy at all for these Respondents. It was time-barred many years before Respondents had suffered any injury (and before one of them was even born!), and it could not have provided Respondents any remedy by way of damages. The California Supreme Court correctly rejected Beech's contention that an action under Section 1486(a) was Respondents' only remedy if they wished to challenge whether the design of the Travel Air complied with applicable safety regulations.

CONCLUSION

No amount of rhetorical manipulation by Beech can transform this case into something which it decidedly is not: a case presenting a substantial federal question worthy of review by this Court. For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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